PRIVY COUNCIL REPORT

KONG MING BANK BERHAD v. SIM SIOK ENG

[P.C. (Lord Diplock, Lord Elwyn-Jones, Lord Scarman, Lord Bridge of Harwich, and Lord Brightman)
June 14, 1982]
[Privy Council Appeal No. 42 of 1980]

Limitation – Claim on overdraft by bank – Money lent under agreement that it shall be payable on demand – When time begins to run – Payment made on account of loan – Time of payment substituted for date when loan is made – Whether claim for compensation for the breach of a contract in writing – Sarawak Limitation Ordinance, section 20 and schedule Articles 3, 40, 93, 94, 97 and 101.

Banking – Overdraft by bank – Whether demand necessary to enable bank to sue – Overdraft secured by charge on lands – Overdraft exceeding maximum under charge – Claim by bank on overdraft – Limitation – Sarawak Limitation Ordinance, Schedule Articles 40, 97 and 101.

In this case the appellant bank had given an unsecured overdraft accommodation to the respondent. Subsequently in order to increase the overdraft facility, the respondent charged his lands to the bank to secure the repayment on demand of the overdraft up to a maximum of $90,000. The overdraft was allowed to exceed $90,000 and the account was dormant from November 4, 1974 when the appellant made a payment of $65,000, thereby reducing the overdraft to $194,957.12. In 1978 the bank brought an action to recover the whole of the sum owing on the overdraft. The only defence of substance was the plea that the claim was statute-barred under the provisions of the Limitation Ordinance of Sarawak. The learned judge of the High Court ruled against the plea and gave judgment for the appellant. On appeal to the Federal Court, it was held that the claim was statute-barred as provided in Article 40 of the Schedule to the Limitation Ordinance as in the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the last payment of interest or part payment of principal which in this case was the 4th of November 1974 and three years had elapsed, since that date before the action was brought. The Federal Court held that Article 97 was not applicable as the bank's action was not for compensation for breach of a contract in writing – See [1980] 2 M.L.J. 21.

The appellant appealed.

Held: (1) it is plain that the suit falls within the description in Article 40 of the Schedule to the Limitation Ordinance for it was a suit "for money lent under an agreement that it shall be payable on demand". If as the appellant urged, the parties agreed that demand must be made, there is no way of avoiding the conclusion that the words of the article aptly describe the appellant bank's claim. Time therefore began to run when the loan was made;

(2) in this case as there had been a payment on November 4, 1974 this date has under section 20 of the Limitation Ordinance to be substituted for the date when the loan was made;

(3) although if a case comes within a specific article such as Article 40 there is no room for the application of a general article, the application of article 94, which extends the period of limitation for contracts in writing, is not thereby excluded; Article 94 was intended to substitute 6 years for any lesser period of limitation for any claim for compensation based on a breach of contract, where the contract was in writing, while retaining as the time from which the period was to run the time specified in the article appropriate to the type of contract from which the right to sue was founded;

(4) the claim in this suit may properly be described as one for compensation for breach of contract and the contract being in writing, the period of limitation is six years and in this case had not expired when the action was commenced.

Cases referred to:–

(1) *Lloyds Bank Ltd.* v. *Margolis* [1954] 1 All E.R. 734, 738.

(2) *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110.

(3) *Norton* v. *Ellam* (1837) 2 M & W 461; 150 E. R. 839.

(4) *Bradford Old Bank* v. *Sutcliffe* [1918] 2 K.B. 833, 840, 848.

(5) *Kwong Yik (Selangor) Banking Corporation Limited* v. *The Malayan Daily Express (1926) Ltd.* [1933] M.L.J. 198.

(6) *Vythilinga Pillai* v. *Thetchanamurthi Pillai* (1880) I.L.R. 3 Mad. 76.

(7) *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* [1916] 44 I.A. 65.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Gatehouse Q.C. (*Peter Mooney* with him) for the appellant.

Nicholas Lyell Q.C. (*Lee Chuan Eng* with him) for the respondent.

Cur. Adv. Vult.

Lord Scarman (delivering the Judgment of the Board): On April 7, 1978 the appellant, the Kong Ming Bank Berhad ("the bank"), issued a specially indorsed writ claiming from the respondent, Sim Siok Eng, the sum of Malaysian dollars $380,172.17, the balance of money lent and interest thereon. The figure was later amended to $421,173.70, being the total of principal and interest owing on March 31, 1978. The only defence of any substance raised by the respondent was the plea that the claim was statute-barred under the provisions of the Limitation Ordinance of Sarawak. The judge in chambers ruled against the plea and gave judgment for the appellant. The Federal Court of Malaysia allowed the respondent's appeal, holding the claim to be barred. The bank now appeals to His Majesty the Yang di-Pertuan Agong.

The respondent was for many years a customer of the appellant bank. On July 25, 1970 his current account was overdrawn in the sum of $3,671.61. Desiring to increase his overdraft facility, the respondent on August 20, 1970 executed a memorandum of charge in favour of the bank to secure a fluctuating overdraft to a limit of $90,000. The security given consisted of two parcels of land in Kuching. The memorandum included not only the charge but the personal promise by the respondent to repay on demand whatever by way of principal and interest was at the date of demand then owing to the bank. The agreed rate of interest was 12% per annum with a provision enabling the bank by notice to increase or reduce the rate at its discretion.

The respondent drew heavily on the account, the bank allowing the overdraft to exceed the limit of the charge. By June 28, 1971 he was overdrawn in the sum of $259,957.12 inclusive of interest. From that date until November 4, 1974 the account remained dormant, the only activity being the regular periodic debit by the bank of accruing interest.

In October 1974 the bank released upon the respondent's request a parcel of land from charge; and on November 4, 1974 the respondent made a payment of $65,000, thereby reducing the overdraft to $194,957.12.

After November 4, 1974 nothing occurred to the account other than the regular addition by the bank of accrued interest. The respondent neither drew on the account nor paid anything in. On April 4, 1978 the bank's lawyers demanded payment of the balance owing: and three days later, April 7, the bank's writ was issued.

When the appeal was opened, counsel for the appellant informed the Board that he was confining his argument to two submissions:—

(1) that the period of limitation did not begin to run against the bank until April 4, 1978, the date of the demand for payment:

alternatively

(2) that, if it should be held that the period of limitation began to run against the bank from November 4, 1974, the date of the last payment by the respondent into the account, the relevant period prescribed by the Ordinance was six years.

If he should succeed on either submission, he succeeds in the appeal and the bank is entitled to judgment for the amount claimed.

The Limitation Ordinance of Sarawak, which is similar to other limitation enactments in Malaysia, is based not on the English Statute but on the Indian legislation, the structure of which it follows closely. Argument by analogy from the English law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance. Section 3 provides that every suit instituted after the period of limitation prescribed for it by the Schedule shall be dismissed, if limitation is set up as a defence. Section 20 provides that when a payment on account of interest or principal is made by a debtor, a new period of limitation, according to the nature of the original liability, shall run from the time of the payment. It is this provision which makes November 4, 1974 a critical date: it has to be substituted for the date when the loan was made.

The schedule to the Ordinance sets out in numbered articles the particulars of the limitations applicable to every class of suit. The Schedule which is in seven parts includes 115 articles. The parts are distinguished from each other by the period of limitation with which each deals. Part III, which includes articles 20 to 93, prescribes a period of 3 years' limitation. Part IV, which includes articles 94 to 97, prescribes a period of 6 years. Each article specifies in its fourth column the time from which the period of limitation begins to run. Though it is a simple inference to draw that the period begins to run from the date when the liability arises to make the payment or do the thing specified in the article, only one article refers in terms to accrual of the right of action, namely the general "sweeping-up" article 97 which is in these terms:—

"Description of Suit	*Period of Limitation*	*Time from which period begins to run*
97. Suit for which no period of limitation is provided elsewhere in this Schedule.	six years	When the right to sue accrues."

The great majority of the articles deal with particular descriptions of suit, each of them specifying the time from which the period of limitation begins to run.

The appellant bank in its written case contended that the relevant article was article 101, which provides that the period for a suit to enforce payment of money charged upon immovable property is 12 years from when the money became due, which on its submission was the date of demand. But counsel abandoned this case – a course which was inevitable in view of the fact that the overdraft far exceeded the limit of the charge. His alternative case, which has become his only case, is founded on article 94, which it will be necessary to set out in full. The respondent relies simply on article 40, which he says specifically covers the present case. Article 93 should also be mentioned, if only for comparison with article 94.

Articles 40 and 93 are in Part III of the Schedule, and are as follows:–

"Description of Suit	*Period of Limitation*	*Time from which period begins to run*
40. For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
93. For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for.	Three years	When the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases."

Article 94 is in Part IV and is as follows:–

"Description of Suit	*Period of Limitation*	*Time from which period begins to run*
94. For compensation for the breach of a contract in writing	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing."

It will be noted that article 40 is an article dealing specifically with one description of suit, i.e. for money lent under a contract of loan which provides for repayment upon demand, whereas the other two articles are general in character. But there is an important difference between articles 93 and 94. Article 93 covers any contract not in writing *"and not herein specially provided for"* (emphasis added). Article 94 requires the court first to identify the article in the Schedule appropriate to the contract sued upon and then to allow a period of 6 years if the contract be in writing. Thus article 93 is a true "omnibus" or "sweeping up" provision comparable with the more general article 97, whereas article 94 is concerned to extend the period of limitation in cases covered by other articles.

Counsel for the bank, opening the appeal, directed attention to the terms of the memorandum of charge. He submitted that upon its true construction a demand for payment had to be made before a cause of action against the respondent arose. He relied on the decision of Upjohn J. (as he then was) in *Lloyds Bank Ltd.* v. *Margolis*[1] where the judge said at page 738:–

"In my judgment, where there is the relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge which provides that the money which is then due or is thereafter to become due is to be paid 'on demand' that means what it says. As between the customer and banker, who are dealing on a running account, it seems to me impossible to assume that the bank were to be entitled to sue on the deed on the very day after it was executed without making a demand and giving the customer a reasonable time to pay. It is, indeed, a nearly correlative case to that decided in *Joachimson* v. *Swiss Bank Corporation*[2] where the headnote was this:–

'Where money is standing to the credit of a customer on current acoount with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent.'

In this case the agreement has provided quite clearly what is to be done before the bank can sue. They must demand the money."

The respondent's submission on the point of construction was that the promise to pay on demand was a promise to pay a debt present and owing and was comparable with the promise in a promissory note to pay on demand. No express demand, he submitted, was necessary to enable the bank to sue and he relied on *Norton* v. *Ellam*[3] and on *dicta* in *Bradford Old Bank* v. *Sutcliffe*[4] *per* Pickford L.J. at page 840 and Scrutton L.J. at page 848.

The Federal Court decided the case in favour of the respondent, because it construed the memorandum of charge in the sense for which the respondent contended. But, in the opinion of the Board, the point which is difficult and of considerable importance in banking law, does not arise for decision in this appeal.

It is plain that the suit falls within the description in article 40 of the Schedule to the Ordi-

nance; it is a suit "for money lent under an agreement that it shall be payable on demand". For, if, as the appellant has to urge, the parties agreed that a demand must be made, there is in the opinion of the Board no way of avoiding the conclusion that the words of the article aptly describe the appellant bank's claim.

In order to overcome this difficulty counsel for the appellant was driven to argue that the words of description in Article 40 do not mean what they say. He was compelled to submit that they did not cover an agreement, such as the memorandum of charge, which on its true construction requires a demand to be made as a condition precedent to the debtor's obligation to pay. He justified this remarkable interpretation of the language of the article by reference to the general principle of English law that action must be commenced within a period of limitation beginning with the accrual of the cause of action. Any other interpretation would, he suggested, mean that in some cases, of which this would be one, time would begin to run under the article from a date prior to the accrual of the cause of action.

At first sight there is much to be said for counsel's argument in so far as it is based upon the principle of English law relating to the limitation of actions. But reflection reveals that it is neither consistent with the plain words of the Ordinance nor necessary to enable justice to be done. The courts of Malaya and Malaysia have recognised that effect must be given to the provisions of the Ordinance (and the other limitation enactments derived from the Indian model) according to the terms of the enactment where they are specific, clear and unambiguous. For instance, in *Kwong Yik (Selangor) Banking Corporation Limited* v. *The Malayan Daily Express (1926) Limited*[5] Terrell, Acting C.J. and presiding in the Malayan Court of Appeal, which had before it an appeal from Selangor where there was in force a limitation enactment of the same model as the Ordinance now under consideration, had this to say (at page 201) in a case in which it was necessary to determine the time from which the period of limitation began to run in a claim by a bank against the guarantor of an overdraft:—

"Now, a cause of action may or may not accrue, upon the actual wording of any particular contract of guarantee, every time the bank makes an advance to the company, but article 47 [Article 46 in the Sarawak Ordinance] says nothing about the accrual of a cause of action. Even, therefore, if it could be argued that under exhibit B a fresh cause of action arose every time an advance was made, that is not the criterion under article 47. The accrual of a cause of action may be a matter of inference, but under article 47, the time or contingency cannot be a matter of inference – it must be 'specified', or else the article cannot apply."

In that case the time was postponed from the date of the last advance to the principal debtor, which it was contended upon the construction of the guarantee was the moment at which the guarantor became liable, to the date of demand upon him to pay the debt. In the present case, if effect is to be given to the plain language of the Ordinance, the time should be ante-dated to a moment before accrual of cause of action. At first sight, this appears anomalous. But in fact it causes no injustice. Its effect is to specify as the beginning of the period of limitation a time at which the creditor had it in his power by his own act to perfect his cause of action and sue. The present case is a classic illustration; for the right to payment on demand, which the appellant in this case says is his by contract under the terms of the memorandum of charge, is one which he could have exercised, if he chose, at any moment after the loan was made by demanding payment.

The first submission, therefore, of the appellant fails, being defeated by the clear language of article 40 of the Schedule to the Ordinance.

It now becomes necessary to consider the appellant's second submission. Article 40, if considered in isolation from the other provisions of the Schedule, would cover the present case with the result that the appeal would fail. In holding that article 40 applied the Federal Court dismissed in one sentence the appellant's case based on article 94, saying that the short answer was that the claim was not for compensation for breach of contract but for money lent. Their Lordships, however, think that the point requires a closer analysis than the Federal Court gave it. Article 94 makes special provision for contracts in writing. If it applies, the suit was in time, being within 6 years from November 4, 1974, this being the combined effect of article 40 which applies to money lent which by agreement is repayable on demand, section 20 of the Ordinance which substitutes the date of the last part payment by the debtor for the date of the original loan, and article 94 itself which, where the contract of loan is in writing, substitutes 6 years for 3 years as the period of limitation.

First, there is authority for the proposition that, although if a case falls within a specific article such as article 40 there is no room for the application of a general article, the application of

article 94, which extends the period of limitation for contracts in writing, is not thereby excluded. In the *Kwong Yik* case (*supra*), which was concerned with the Federal Malay States enactment which was similar in all essential respects with the Sarawak Ordinance, the acting Chief Justice put the point succinctly (page 202):—

"When the contract is in writing, article 95 [Article 94 in the Sarawak Ordinance] can be applied whether or not there is any other article which would be applicable to a similar contract not in writing."

Their Lordships agree with this construction of the Ordinance. It is clear that article 94 was intended to substitute 6 years for any lesser period of limitation for any claim for compensation based on a breach of contract where the contract was in writing, while retaining as the time from which the period was to run the time specified in the article appropriate to the type of contract upon which the right to sue was founded.

There remains only the question whether the suit in this case can properly be described as one "for compensation for the breach of a contract". The claim was formulated in the statement of claim as a claim for money lent. But it cannot be doubted that a failure to repay a present and enforceable debt, whether the liability arises on the loan being made (which, subject to the extension of section 20 of the Ordinance, is the respondent's case) or only on demand (which is the appellant's case), is a breach of contract. Whichever be the true view as to the date of the breach of contract, the appellant's suit is, in their Lordships' view, a claim based on breach of contract.

But is the claim properly described as one for *compensation* for breach of contract? The Indian origin of the Ordinance now assumes importance. In *Vythilinga Pillai* v. *Thetchanamurti Pillai*[6] the High Court of Madras held that a suit to recover arrears of rent was a claim for breach of contract. The Court noted that compensation was a general term used in the Indian Contract Act to denote a payment which a party is entitled to claim on account of loss or damage arising from breach of contract. In *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[7] the Judicial Committee of the Privy Council took the same view. Lord Sumner, who delivered the judgment of the Board commented (at page 70) that an interpretation so often and so long put upon the statute by the courts in India should not now be disturbed.

Their Lordships respectfully agree. The claim in this suit may properly be described as one for compensation for breach of contract. The contract being in writing, the period of limitation is 6 years. The time from which the period begins to run is that specified in article 40, by which the suit would have been governed, had the contract not been in writing. Section 20 of the Ordinance substitutes the last part payment by the debtor for the date when the loan was made. It is a theoretical possibility that the loss to be compensated could be less (or more) than the principal and interest owing. But this has never been suggested: and the *prima facie* measure of the loss must be the amount of the debt owing when the suit was instituted.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be allowed with costs here and below and that the appellant be at liberty to enter judgment for the amount claimed.

Appeal allowed.

Solicitors: *Stephenson & Harwood; Linklaters & Paines.*